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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 305.

FRANCIS A. DREXEL, ANTHONY D. DREXEL, CHARLES H. GODFREY, JOSEPH W. DREXEL, JOHN PIERPONT MORGAN AND J. HOOD WRIGHT, APPELLANTS,

vs

LOUISE BERNEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 18, 1884.

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1 To the judges of the circuit court of the United States for the southern district of New York:

Francis A. Drexel, Anthony J. Drexel, and Charles H. Godfrey, citizens of the State of Pennsylvania; Joseph W. Drexel, John Pierpont Morgan, and J. Hood Wright, citizens of the State of New York, bring this their bill against William Berney, a citizen of Texas, and Saffold Berney, Chollet Berney, Robert Berney, Phillipa Rousseau, Sophia White, Ann M. Ball, Phillipa E. Harley, Laurent B. Hallonquist, Robert L. Hallonquist, and William C. Hallonquist, citizens of the State of Alabama, and Louise Berney, a citizen of the Republic of France.

And thereupon your orators complain and say that on the 2nd of November, 1864, at Croydon, England, one Robert Berney executed his last will and testament, dated of that day, wherein and whereby he bequeathed to his wife, Louise Berney, certain supplies and ornaments of the house and person and the sum of one thousand three hundred francs of French currency, and wherein he directed the trustee or trustees for the time being of his said will, as soon as conveniently might be after his decease, to set apart or invest in their, his, or her names the sum of three thousand dollars in trust for his cousin, Eliza Ozier, and to each of his executors therein named the sum of fifty dollars, and wherein he also gave and bequeathed all the residue of his personal estate and all his real estate (if any), whether such personal estate or real estate should be or be
2 situate in England, France, or America, elsewhere to his said wife, Louise Berney, John Berney, of Croydon aforesaid; John Drummond, of the same place, and William Drummond, of the same place, his executrix and executors therein named upon and for the trusts and purposes in said will declared—that is to say, to pay all his just debts and funeral and testamentary expenses, and out of the annual proceeds of his said real and residuary personal estate to pay to his said wife an annuity or yearly sum of thirty thousand francs during her widowhood, and after her second marriage, if such should happen, then to pay her an annuity or yearly sum of five thousand francs, and to the Countess of Perregaux, the sister of his said wife, an annuity or yearly sum of two thousand francs during her life, and after the decease of his said wife to pay to his godson, Robert Hallonquist, a son of his then late sister, Sophia Hollonquist, and his godson, Robert Berney, son of his brother, James Berney, one thousand dollars if and when they should attain the age of twenty-five years, and to divide the capital of his real and residuary personal estate (after answering the aforesaid bequests and directions) and all unapplied accumulations and investments thereof equally among all such of his nephews and nieces, children of his brother, James Berney, and his sisters, Phillipa Seibels and Sophia Hallonquist, as should be living at his decease, the several shares of such nephews and nieces to be, respectively, payable to them at their respective ages of twenty-five years, his said trustees retaining the
3 shares of any of them who might, for the time being, be under age, and paying the annual proceeds thereof to their

parents or parent, guardians or guardian, for the benefit of such nephews and nieces, respectively, and in which said will said Robert Berney appointed his said wife, Louise Berney, and the said John Berney, John Drummond, and William Drummond executors and trustees of said will.

And your orators further show unto your honors that afterwards and on or about the 25th of September, 1874, the said Robert Berney executed a codicil to his said will, dated of that day, wherein, in lieu of the annuity of 30,000 francs by said will given to his said wife, he directed the payment to her during her widowhood of an annual sum of 40,000 francs, and gave to said James Berney his gold watch and chain, and also the sum of $50,000, and to his said sister, Phillipa Seibels, the sum of $20,000, both of such legacies to be paid immediately after his decease, and wherein he revoked the appointment of the executors and trustees made by his said will and the bequests of fifty dollars each so given to them, and, in lieu of such appointment, appointed his said wife, Louise Berney, his said brother, James Berney, one Messie-r de St. James, of Paris, France, and said John Drummond and William Drummond executors and trustees of his said will, and granted to each of them a legacy of fifty dollars in acknowledgment of their acceptance of the said appointment of such trustees and executors.

4 And your orators further show unto your honors that said Robert Berney died at Paris, France, on the 19th of November, 1874, and that there survived him his said wife, Louise Berney, his said brother, James Berney, and the eight children of his said brother James, to wit, John Berney, since deceased; Saffold Berney, William Berney, Phillippa Rousseau, Sophia Berney, Robert Berney, James Berney, and Chollet Berney; his sister, Phillipa Seibels, and her daughter, Ann M. Ball, and the children of his deceased sister, Sophia Hallonquist, to wit, Laurent Hallonquist, William Hallonquist, Robert Hallonquist, and Phillipa E. Harley; and that his said wife was a native of France, and was with him at Paris when he died, and his said brother and sister and the children of his said deceased sister at that time were all citizens of the United States and residents of and were domiciled in Montgomery county, in the State of Alabama, and that said St. James was a resident of France, and the said Messrs. Drummond were residents of England, and that personal estate was left by said Robert Berney in France, England, and the United States.

And your orators further show unto your honors that said Robert Berney was by birth a citizen of the United States, and so continued during his life, and that for some years previous to his death said Robert Berney had lived out of the United States, at Paris, France, and elsewhere, but that the laws of France are such that a

5 citizen of another country may not and does not by residence in France acquire a domicile in France, except by the authorization or permission of the government of France, and that said Robert Berney had not ever received such authorization or permission and had not become domiciled in France; and that upon his death the said Louise Berney caused the said will and codicil to

be presented to the president of the civil tribunal of first instance of the department of the Seine, to whom, by the laws and customs of France, it rightfully appertained to receive and dispose of the same, and who thereupon and on the 5th of December, 1874, made an order committing the same and the supervision of the administration of the estate of said Robert Berney to Antoine Albert Laverne, a notary at Paris aforesaid and one of the law officers of France who by its laws and customs have sole and exclusive charge of such matters.

And your orators further show unto your honors that afterwards and on the 8th of February, 1875, the said James Berney, as one of the executors of said will and codicil, procured the admission thereof to probate and the establishment and record thereof as the last will and testament of said Robert Berney in the probate court of said Montgomery county, Alabama, by decree of that date, and in which said decree it was adjudged by said court that said Robert Berney was a citizen of the United States, domiciled in Montgomery county aforesaid, and that it, said court, was fully authorized and
6 empowered to admit said will and codicil to probate, and that letters testamentary upon the same were thereupon issued to said James Berney by said court, and that at the time of said decree the said James Berney, and his said children and the said Phillipa Seibels and her said daughter and the said children of his deceased sister, Sophia Hallonquist, were all citizens and residents of said Montgomery county, and by the laws of Alabama the said decree and issue of letters testamentary were duly given and made and the same could not and cannot be impeached collaterally and are in law conclusive of the right and power of said James Berney as executor of the said last will and testament of said Robert Berney, deceased, and of the due admission of said will and codicil to probate and of the due proof thereof.

And your orators further show unto your honors that thereafter the said James Berney, as such executor, being at the city of New York, executed to said St. James a certain power of attorney, wherein and whereby it was, among other things, recited that a notable portion of the estate of the said Robert Berney was in the hands of the directors of the Bank of France and of other banks and financial establishments in France and Europe, and wherein and whereby, as such executor, he made, constituted, and appointed the said St. James his true and lawful attorney, for him and in his name, place, and stead to ask, demand, sue for, collect, receive, and give acquit-
7 tances for all debts due to or other property coming to or belonging to the estate of said Robert Berney, to grant, bargain, and sell any and all property belonging to said estate, whether realty or personalty, on such terms and at such prices as might seem meet to him, and good and sufficient titles thereto in his name to make, either with or without covenants of warranty; also to hypothecate, pledge, or mortgage the same; to pay all the debts and liabilities of said deceased; to divide and pay over all the property pertaining to said estate among the legatees, in accordance with the terms of said will and codicil, and more especially to ask, demand,

recover, and receive all bonds, stocks, rents, moneys, or other property now deposited in the Bank of France and other financial establishments, whether the same should be to the bearer or standing in the name of said Robert Berney, and to execute and deliver sufficient discharges and acquittances in all things pertaining to said estate.

And your orators further show unto your honors that afterwards said James Berney made application to the surrogate of the city and county of New York for the issue of letters testamentary of said will and codicil to him, and that said application was made upon duly certified copies of the record of the probate of the same in the probate court of Montgomery county aforesaid, and was granted, and that such letters testamentary were issued to said James Berney by said surrogate on or about the 9th of March, 1875, and that
8 the adjudication by said surrogate remains unimpaired and in full force, and was duly given and made.

And your orators further show unto your honors that the several acts and things hereinabove alleged to have been done by said James Berney for the admission to probate of said will and codicil, and the obtaining by him of letters testamentary, and the execution of said power of attorney by him as such executor to said St. James were all known and assented to by said Louise Berney and the other persons named as executors and legatees in said will, and the same were so done by him in performance of the duty imposed upon him by said will and codicil, and in entire good faith, and without objection on the part of any of them.

And your orators further show that at the time of the death of the said Robert Berney his chattels personal and his bonds, certificates of stock, and other evidences of title to choses of action were in the city of Paris, and it was the right and duty of the executors to take charge thereof and put the said assets in due course of administration, and the said executors adopted, ratified, and confirmed the said proceeding in the said probate court of Montgomery county, Alabama, and the purpose and intention of Louise Berney and her coexecutors were in part to establish the fact of said Robert Berney's citizenship and domicile in the United States, and thereby secure immunity for his said estate from a certain succession tax,
9 which by the laws of France would otherwise have become payable thereon, but chiefly to provide for the due, lawful, and proper administration of the property, then primarily in the custody of the said Louise Berney as widow and substantially under the control of the said executors by virtue of their selection and designation as such in and by the will of the testator, and that it was by the joint acts and representations of the said executors in the presence of the said notary public (who was then acting by virtue of the order of reference to him as a judicial officer, clothed with the powers of a judge of probate) that the transfer of the assets of the testator then in the city of Paris to the said St. James as the attorney-in-fact of the said James Berney, as the acting executor of the said will, was permitted and sanctioned by the said notary public, and that thus by the joint act and deed of the said executors,

acting with the knowledge and approval and in behalf of all the parties in interest in the said estate, the possession and control of said assets were confided to the said St. James, who was thereby invested with all the muniments and *indicia* of title and held out to the world as the lawful attorney-in-fact of the lawful executors of the said Robert Berney, deceased.

And your orators further show unto your honors that on the 30th March, 1875, and thereafter, on the 31st of the same month,
10 and on the 3rd and 4th of May following, the matter of the administration of said estate of said Robert Berney, deceased, was proceeded with before said notary, Laverne, at Paris aforesaid, and that then and there an inquiry was had and conducted by said notary, Laverne, as to the actual citizenship and domicile of said Robert Berney at the time of his death, in the presence and at the instance of and with the aid of said Louise Berney and said St. James, and that representations were then made by said Louise Berney and the said James Berney and the said St. James, as well for themselves as for the said legatees named in said will and codicil, that said Robert Berney was an American citizen, having his domicile in Montgomery county aforesaid, and that said will and codicil had been duly admitted to probate and letters testamentary thereon had been duly issued by said probate court of Montgomery county, and that by the laws of Alabama said James Berney was the sole executor qualified to act, and had the sole right to administer and dispose of the estate of said Robert Berney, and that said power of attorney was duly executed and conferred upon said St. James all the *persons* and rights which it purported to confer upon him, and proofs in support of said representations were received and were accepted by said notary, Laverne, and the facts were stated and incorporated in accordance therewith in certain writings now remaining of record in the office of said notary, Laverne.

11 And your orators further show unto your honors that afterwards and on the 11th of June, 1875, further proceedings were had before said notary, Laverne, at Paris aforesaid, in the presence and at the instance of and with the aid of said Louise Berney, said St. James, and said James Berney, who was at the time in Paris, and the like representations were then and there made as to the citizenship and domicile of said Robert Berney, and the admission of said will and codicil to probate in Alabama, and the issue of letters testamentary thereof to said James Berney, and the said power of attorney executed by said James Berney to said St. James, and proofs in support thereof were received and were accepted by said notary, Laverne, and the facts were stated and incorporated in accordance therewith in certain writings now remaining of record in the office of said notary, Laverne, and in which said writings the said Louise Berney acknowledged receipt from said James Berney as such executor of the legacies given to her by said will and codicil.

And your orators further show unto your honors that by the laws of France, where said proceedings were had and where the said writings now remain of record, as aforesaid, the same were and are,

in law and fact, an adjudication by a judicial officer having jurisdiction of the persons and of the subject-matter (the chattels personal and the bonds, certificates of stock, and other evidence
12 of title to the choses in action of the said testator being then in the said city of Paris, in the possession and under the control of the said executor for the purposes of administration); that said Robert Berney was a citizen of the United States, having his domicile in Montgomery county, State of Alabama, and the said will and codicil were duly admitted to probate, and said letters testamentary duly issued by said probate court of said Montgomery county, and that said power of attorney duly conferred upon said St. James all the powers and rights it purported to confer, and that by the laws of France neither said Louise Berney nor said St. James nor James Berney, nor any one claiming under them, nor any other executor named in said will, would be or is permitted to allege or maintain the contrary thereof.

And your orators further show unto your honors that among other things of value the said Robert Berney left $200,000 in nominal amount of United States bonds of the kind known as "registered fives;" also, $12,500 in nominal amount of capital stock of the United States Mortgage Company; also, $58,200 in nominal amount of the capital stock of the New York Central Railroad Company; also, £8,000 in nominal amount of bonds of the New York and Canada Railway Company; also, a certain investment of £3,000 upon bond and mortgage on real estate at Croydon, England, and moneys with Messrs. Rothschild & Co., of London, England, and that the muniments of title of said things of value came into
13 the possession of said Louise Berney and the said St. James, and that the said $12,500 of the capital stock of the United States Mortgage Company, and the said $58,200 of the capital stock of said New York Central Railroad Company were sold and converted into money by the said James Berney as such executor, and under and by virtue of the power and authority conferred upon him by the letters testamentary so issued to him as aforesaid, without objection on the part of any of the said persons interested in the estate of said Robert Berney as executors, trustees, legatees, or otherwise.

And your orators further show unto your honors that on or about the 15th of June, 1875, said Louise Berney and said St. James proved said will, and procured letters testamentary thereon to be issued to themselves by one of the judges of the probate, divorce, and admiralty division of the high court of justice in England, but that said proceedings were such as in England are known as proof in "common form," and not upon evidence of the execution of said will and codicil by the subscribing witnesses thereto, and that such proof in common form and the letters testamentary thereupon issued gave the executors receiving the same authority only to collect and to reduce to possession the personal assets of the testator, and that under and by virtue thereof the said Louise Berney and said St. James obtained possession of said £8,000 bonds of the
14 New York and Canada Railway Company, and sold the same and received the proceeds as such executors under and by

virtue of the power and authority conferred upon them by the letters testamentary so issued to them as aforesaid; and that afterwards and on the 24th of April, 1878, said John Drummond and William Drummond, having previously renounced and disclaimed the executorship and trusteeship to which they were appointed by said will and codicil, said Louise Berney and said St. James, as such executors under the aforesaid letters testamentary so issued to them in England, and the said James Berney, as such executor under the aforesaid letters testamentary so issued to him in Montgomery county, Alabama, and all three of them, as the sole trustees under said will and codicil, assigned and transferred said bonds and mortgage for £3,000, and received the proceeds of sale thereof without objection on the part of any of said persons interested in the estate of said Robert Berney, as legatees or otherwise.

And your orators further show unto your honors that said St. James, as attorney for said James Berney, executor under the power of attorney aforesaid, and through his agents at the city of New York, delivered the said $200,000 United States bonds to your orators at the city of New York, and directed them to change the same into bonds payable to bearer, of the like issue, by selling
15 the same and with the proceeds purchasing coupon bonds of the same issue, which was the only method of effecting such change, and that the said agents of said St. James procured and delivered to the officers of the United States Treasury satisfactory evidence of their authority to transfer the said registered bonds, and upon which the said officers did transfer the said bonds, and your orators sold the same and with the proceeds purchased $195,000 of United States coupon bonds of the same issue and delivered the same, together with $3,759.58 in money, to the agents of said St. James, who afterwards delivered said bonds and money to said St. James, and the same came to his hands while he and said Louise Berney held said letters testamentary issued to them in England as aforesaid, and that by the laws of England the receipt thereof by said St. James as aforesaid was and is a bar to any claim by said Louise Berney as such executrix or trustee against your orators for the said $200,000 of bonds.

And your orators further show unto your honors that the several legacies in said will and codicil made to said Louise Berney, to said Robert Hallonquist, to said Robert Berney, to said James Berney, and to said Phillipa Seibels, and to his executors who should qualify, were all received by said legatees from said James Berney as such executor under the aforesaid letters testamentary so
16 issued to him in Montgomery county, Alabama, and that for many years and until his death the said James Berney acted as the agent and representative of the said nephews and nieces of said Robert Berney in the matter of the administration of his said estate, and was in fact the guardian of such of his said children as were then not over the age of twenty-one years, and had full knowledge of all the transactions aforesaid.

And your orators further show unto your honors that subsequently to all the aforesaid acts and doings, and in or about the

year 1880, the said James Berney sent his said son, Saffold Berney, to Paris, France, and that the said Saffold Berney, acting as the agent and representative of said James Berney as such executor as aforesaid, and also on his own behalf and as agent and representative for the said William Berney, Chollet Berney, Robert Berney, Phillippa Rousseau, Sophia White, Ann Mary Ball, Laurent Hallonquist, Robert Hallonquist, William Hallonquist, and Phillippa E. Harley, instituted judicial proceedings before competent law officers at Paris aforesaid, and, in accordance with the laws and customs of France, against said St. James, for an account by said St. James of his administration of said estate of said Robert Berney, and that, as your orators are informed and believe to be true, thereupon said St. James surrendered and delivered certain property and things of value, which were accepted by said Saffold Berney and the said persons for whom he was so acting as agent and representative in full satisfac-
17 tion and discharge of their demands against said St. James; but the precise nature of said proceedings and what was actually done therein your orators are not informed and cannot learn, because the said St. James has since died and because such of said proceedings as remain of record in the offices of law officers in France are not accessible to your orators by the laws and customs of France.

And your orators further show unto your honors that the said defendants now claim that said St. James diverted the said $195,000 of United States coupon bonds and $3,759.58 in money from the trusts under which the same should have been held by the executors and trustees of said will and codicil of Robert Berney, and that the said decree of the probate court of Montgomery county, Alabama, was and is void and of no effect, on the alleged ground that said Robert Berney was not domiciled in said Montgomery county, but was domiciled at Paris aforesaid, and that the said transfer of said $200,000 of United States registered bonds to your orators was unlawful, and that your orators are liable therefor, and said defendants have combined and confederated together to assert and maintain their said demand in the following manner—that is to say: On or about the 25th of May, 1881, said Saffold Berney, alleging that he was the attorney-in-fact for said Louise Berney, presented to the surrogate of the county of New York a certain petition, wherein and whereby it was falsely asserted and represented that said will
18 and codicil of said Robert Berney had been duly admitted to probate in said high court of justice in England, and that assets of his estate remained in said county unadministered, and wherein the fact of said probate in Alabama and the subsequent issue of letters testamentary upon such probate by the predecessor in office of said surrogate to said James Berney was fraudulently suppressed, and said surrogate thereupon issued ancillary letters testamentary to said Louise Berney alone, under and by virtue whereof an action has been brought by said defendants, in the name of said Louise Berney, as executrix of Robert Berney, deceased, against your orators, and in which said action it is alleged that said Robert Berney was domiciled in France, and that the said probate of his said will and codicil in Montgomery county, Alabama, was

unlawful and void for want of jurisdiction in said court, and that the said power of attorney was also void, and that your orators are liable to her for an alleged conversion of said $200,000 of United States registered bonds, and that the said defendants claim and insist that the proceedings so taken by said Saffold Berney before the surrogate of the county of New York are conclusive upon your orators of her right so to sue them, although your orators were not parties thereto and are not permitted by law to intervene in said proceedings or to procure the cancellation of the said ancillary letters testamentary so taken out in the name of said Louise Berney.

19 And your orators further show unto your honors that, as they are advised and verily believe, the said defendants are and ought to be estopped in equity and good conscience from now asserting or attempting to assert, as against your orators, that said Robert Berney was elsewhere domiciled than in said Montgomery county, Alabama, or that the said proceedings in the city of Paris whereby the said assets, with all the muniments of title and *indicia* of ownership, were placed in the hands of the said St. James, as the lawful attorney-in-fact of the said James Berney, as the acting executor of the said estate, were not lawful and proper and did not confer the right, power, and authority which they appeared and assumed to confer, and that there is any liability on your orators' part to make good to said estate the said $200,000 of United States registered bonds or the value thereof, and that the several matters and things hereinabove alleged may not be pleaded and do not constitute a defence in said action at law, and that upon the trial of said action evidence thereof may be excluded for that reason; and your orators insist that they should not be subjected to the expense of defending said action at law and of preparing to meet the aforesaid untrue allegations and assertions of defendants.

And your orators further show unto your honors that in addition to said action in the name of said Louise Berney, as executrix as aforesaid, the said defendants have commenced another action

20 in the supreme court of the State of New York, wherein they allege and assert that said Robert Berney was domiciled in France, and that by certain rules of French law the said $200,000 of United States registered bonds became vested in them, and not in said James Berney, as such executor as aforesaid, or in said Louise Berney and said St. James, as such executors as aforesaid.

And your orators further show unto your honors that by the laws of France said Louise Berney, as the widow of said Robert Berney, would have been entitled to a certain portion or share of his said estate had the said Robert Berney been domiciled in France, as now alleged by her, and had the administration and distribution of his said estate been governed by French law, and that the said Louise Berney, having been present at and having participated in the said proceedings so had before the notary, Laverne, ought then to have asserted and claimed any right in that regard which she may have had, but that said Louise Berney not only then omitted to assert or claim that her said husband was domiciled in France, as now alleged by her, and the administration and distribution of his said estate

should be governed by French law, but also then affirmatively claimed and insisted that her said husband was domiciled in Montgomery county, Alabama, and the administration and distribution of his said estate should be governed by the laws of Alabama; and that the said executors and trustees of said will and codicil
21 relied upon said claim and assertion of said Louise Berney, and that their mode of management of said estate was adopted upon the faith thereof, and that the said portion or share of said Robert Berney's estate to which said Louise Berney would have become entitled under French law was much more than the value of said $200,000 United States registered bonds, and that in equity and justice said Louise Berney ought not to be allowed to maintain this suit for her own benefit in any respect nor in any case until an accounting shall have been had between herself, as such widow, and the legatees under said will and codicil.

And your orators further show unto your honors that all of said defendants are beyond the jurisdiction of this court, except so far as they have submitted themselves to its process by bringing the actions aforesaid; that said Louise Berney is an alien and resident of France; that the ordinary process of a *dedimus protestatum* to take the evidence of said Louise Berney cannot be enforced in France, because of its laws; that the facts hereinabove alleged are within the knowledge of said defendants or some of them; that the said defendants have interposed obstacles and impediments to your orators' efforts to ascertain the facts above stated, and have sought and are still seeking to prevent your orators' obtaining competent evidence of said proceedings at Paris, and a discovery of said actings and doings of the defendants is necessary.

Wherefore your orators pray that said matters may be inquired of by your honors, and that the said defendants and each of
22 them may be enjoined and restrained from asserting, claiming, alleging, or setting up in any action, suit, or other proceeding against your orators respecting said $200,000 of United States registered bonds, or any part of said estate of Robert Berney which may have or may come to your orators' hands; that said Robert Berney was not domiciled in Montgomery county, Alabama, and that his said will and codicil was not duly admitted to probate by the probate court of said county, and that letters testamentary thereon were not duly issued to said James Berney, and that said James Berney was not duly authorized to give said power of attorney to said St. James, and that under said power of attorney said St. James was not vested with all the powers of said James Berney as such executor, and in particular that said defendants and each of them may be so enjoined and restrained from using in support of their claim and demand that said Robert Berney was domiciled at Paris, France, the ancillary letters testamentary so issued to said Louise Berney by the surrogate of the county of New York, or any of the proceedings before said surrogate upon which said letters were so issued, or that your orators may have such other or further relief as may be meet.

And may it please your honors to grant unto your orators the

writ of subpœna to be directed to the said William Berney, Saffold Berney, Chollet Berney, Robert Berney, Phillippa Rousseau, Sophia White, Ann M. Ball, Phillippa E. Harley, Laurent B. Hal-
23 lonquist, Robert L. Hallonquist, William C. Hallonquist, and Louise Berney, defendants herein, commanding them by a certain day and under a certain penalty therein to be inserted to be and appear before the judges of this honorable court, then and there, upon their respective oaths, to answer the premises and to stand to and abide by such order and decree therein as shall be agreeable to equity and good conscience.

And your orators will ever pray, &c.

TRACY, OLMSTEAD & TRACY,
Solicitors for Plaintiffs, No. 50 Wall St., New York.

CHARLES EDWARD TRACY,
Of Counsel.

24 U. S. Circuit Court, Southern District of New York.

FRANCIS A. DREXEL, ANTHONY A. DREXEL, CHARLES H. GODFREY, JOSEPH W. DREXEL, JOHN PIERREPONT MORGAN, and J. HOOD WRIGHT

against

LOUISE BERNEY and Others.

Louise Berney, the above-named defendant, by protestation, not confessing or admitting all or any of the matters and things in the plaintiffs' amended bill of complaint to be true in such manner and form as are therein set forth, doth demur to said bill and for cause of demurrer doth allege and insist—

1st. That the plaintiffs have not in and by their said
25 amended bill made or stated such a case as entitled them in a court of equity to the relief prayed for in their said bill against this defendant.

2nd. That they have not therein made or stated any case which entitles them to a discovery of any of the matters or things stated in said bill.

Wherefore, and for divers other good causes of demurrer appearing on the face of said amended bill, the said defendant doth hereby demur to the whole of said amended bill, and also separately to such parts thereof as respectively ask for relief and for discovery, and the defendant demands the judgment of this court whether she shall be compelled to make any further or other answer to said
26 amended bill, and prays to be hence dismissed with her costs and charges in this behalf most wrongfully sustained.

Dated Dec. 1st, 1883.

LORD, DAY & LORD,
Solicitors for Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in law.

GEORGE DE FOREST LORD,
Of Counsel.

SOUTHERN DISTRICT OF NEW YORK:

Franklin B. Lord, one of the firm of Lord, Day & Lord, solicitors for the defendants herein, being duly sworn, saith that this suit was, by special order of this court, commenced by service of the subpœna and bill of complaint on said solicitors instead of upon the defendant, on the ground of her absence from this country and
27 residence in France; that said solicitors have duly appeared for her herein, and that the foregoing demurrer is not interposed for delay, but in good faith, and that the reason why this affidavit is not made by said defendant is that she is still absent from this country, in France aforesaid.

FRANKLIN B. LORD.

Sworn to before — this 1st day of December, 1883.

LUCIUS H. BEERS,
Notary Public, City & Co. N. Y.

Endorsed: U. S. circuit court, south. district of New York. Francis A. Drexel & o's against Louise Berney & o's. Demurrer. Lord, Day & Lord, solicitors for def'ts, 120 Broadway, New York. U. S. circuit court. Filed Dec. 3, 1883. Timothy Griffith, clerk.

28 At a special term of the circuit court of the United States for the southern district of New York, held in the Federal court-rooms, in the city of New York, on the 8th day of January, 1884.

Present: Hon. William J. Wallace, circuit judge.

ANTHONY J. DREXEL *et al. vs.* LOUISE BERNEY & Others.

The defendant, Louise Berney, having demurred to the original bill of complaint in this action, and the demurrer thereto having been sustained, with leave to the plaintiffs to amend said bill, and the plaintiffs having amended their bill of complaint, and
29 the said defendant having demurred to the amended bill of complaint, and the plaintiffs having thereafter applied for and obtained leave to file a supplemental bill, and the plaintiffs having filed a supplemental bill, and the said defendant having demurred thereto, and the demurrers to the said amended bill and the said supplemental bill having been sustained, with leave to file a further amended bill, and the plaintiff having filed such further amended bill, and the said defendant having demurred thereto, and the said last-mentioned demurrer having come on to be tried before the Hon. William J. Wallace, circuit judge, and the court, after hearing counsel for the respective parties, having rendered its decision sustaining the said last-mentioned demurrer:

30 Now, therefore, on motion of Lord, Day, Lord, defendants' solicitors, it is ordered and decreed that the said last-mentioned demurrer be, and the same hereby is, in all things sustained, and that the last-mentioned amended bill of complaint be dismissed with costs to the said defendant-, as adjusted by the clerk, at the sum of twenty dollars and fifty cents.

And it is further ordered, adjudged, and decreed that the said defendant, Louise Berney, do recover of the said plaintiffs the said sum of twenty $\frac{50}{100}$ dollars, and that she have execution therefor.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, south. dist. New York. An-
31 thony J. Drexel *et al.* ag'st Louise Berney & o'rs. Final de-
cree. Lord, Day, Lord, def'ts' sol'rs, 120 Broadway, N. Y
U. S. circuit court. Filed Jan. 8th, 1884. Timothy Griffith, clerk.

32 Circuit Court of the United States for the Southern District of New York, in the Second Circuit. In Equity.

FRANCIS A. DREXEL, ANTHONY J. DREXEL, CHARLES H. GODFREY JOSEPH W. DREXEL, JOHN PIERPONT MORGAN, and J. HOOD WRIGHT

vs.

WILLIAM BERNEY, SAFFOLD BERNEY, CHOLLET BERNEY, ROBERT Berney, Phillipa Rousseau, Sophia White, Ann M. Ball, Phillipa E. Harley, Laurent B. Hallonquist, Robert C. Hallonquist, William C. Hallonquist, and Louise Berney.

The above-named plaintiffs, feeling aggrieved by the decree of this court made and entered in this suit January 8, 1884, and being desirous of appealing therefrom, do hereby appeal from said decree and from the whole and every portion thereof to the Supreme Court of the United States, and they pray that their appeal may be allowed and that a transcript of the record and proceedings
33 in the cause, duly authenticated, may be sent to the said Supreme Court.

Dated New York, January 16th, 1884.

TRACY, OLMSTEAD & TRACY,
Solicitors for said Plaintiffs, 50 Wall St., New York City.

Endorsed: U. S. circuit court, S. D. of New York. Francis A. Drexel *et al. vs.* William Berney *et al.* Notice of appeal to U. S. Supreme Court. C. E. Tracy, sol'r for pl't'ffs, 50 Wall St. N. Y. The within appeal allowed at same term at which decree was made. January 17, 1884. Wm. J. Wallace. U. S. circuit court. Filed Jan'y 21, 1884. Timothy Griffith, clerk.

Service of a copy of the within notice of appeal and allowance thereof is hereby admitted.

Jan'y 18, 1884.

LORD, DAY & LORD,
Sol'rs for Def't, L. Berney.

34 Know all men by these presents that we, Egisto P. Fabbri, of 29 W. 19th street, in the city of New York, and George S. Bowdoin, of No. 268 Madison avenue, in said city, are held and firmly bound unto William Berney, Saffold Berney, Chollet Berney, Robert Berney, Phillipa Rousseau, Sophia White, Ann M. Ball, Phillipa E. Harley, Laurent B. Hallonquist, Robert L. Hallonquist,

William C. Hallonquist, and Louise Berney in the sum of five hundred dollars, to be paid to them, their executors and administrators; to which payment, well and truly to be made, we bind ourselves and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, dated this sixteenth day of January, 1884.

35 Whereas Francis A. Drexel, Anthony J. Drexel, Charles H. Godfrey, Joseph W. Drexel, John Pierpont Morgan, and J. Hood Wright have appealed to the Supreme Court of the United States from a certain decree made and entered on the 8th day of January, 1884, in the United States circuit court for the southern district of New York, in the second circuit, sitting in equity, in favor of said William Berney, Saffold Berney, Chollet Berney, Robert Berney, Phillipa Rousseau, Sophia White, Ann M. Ball, Phillipa E. Harley, Laurent B. Hallonquist, Robert L. Hallonquist, William C. Hallonquist, and Louise Berney in their suit against said last-mentioned person, sustaining her demurrer to complainants' bill with costs:

Now, therefore, the condition of this obligation is such
36 that if the above-named appellants shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

EGISTO P. FABBRI. [L. S.]
G. S. BOWDOIN. [L. S.]

Sealed and delivered in the presence of—
WALTER B. HORN,
Notary Public, Kings Co.

C't'f. filed in New York county.

UNITED STATES OF AMERICA, *Southern District of New York:*

Egisto P. Fabbri, being duly sworn, says that he resides within the southern district of New York, and is worth the sum of one thousand dollars over and above all his just debts and liabilities and exclusive of property exempt by law from levy and sale
37 under an execution.

EGISTO P. FABBRI.

Sworn to before me this 16th day of January, 1884.
[L. S.] WALTER B. HORN,
Notary Public, Kings Co.

C't'f. filed in N. Y. county.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

George S. Bowdoin, being duly sworn, says that he resides within the southern district of New York, and is worth the sum of one thousand dollars over and above all his just debts and liabilities

and exclusive of property exempt by law from levy and sale under an execution.

G. S. BOWDOIN.

Sworn to before me this 16th day of January, 1884.
[L. S.] WALTER B. HORN,
Notary Public, Kings County.

Certificate filed in New York Co.

38 UNITED STATES OF AMERICA.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

On the sixteenth day of January, 1884, before me personally came Egisto P. Fabbri and George S. Bowdoin, to me known to be the individuals described in and who executed the foregoing undertaking, and severally acknowledged to me that they executed the same.

WALTER B. HORN,
Notary Public, Kings Co.

Certificate filed in New York county.

Endorsed: U. S. circuit court, southern district of New York. Francis A. Drexel *et al.*, complainants, *vs.* William Berney *et al.*, defendants. Bond on complainants' appeal. Given and ap-
39 proved January, 1884. The within bond approved Jan'y 17th, 1884. W. J. Wallace. U. S. circuit court, Jan. 17, 1884. Timothy Griffith, clerk.

40 By the honorable William J. Wallace, judge of the circuit court of the United States for the southern district of New York, in the second circuit.

*Stricken out as per stipulation and order filed Aug. 7, 1884.—T. G., cl'k.

To [William Berney, Saffold Berney, Chollet Berney, Robert Berney, Phillipa Rousseau, Sophia White, Ann M. Ball, Phillipa E. Harley, Laurent B. Hallonquist, Robert L. Hallonquist, William C. Hallonquist, and]* Louise Berney:

Whereas Francis A. Drexel, Anthony J. Drexel, Charles H. Godfrey, Joseph W. Drexel, John Pierpont Morgan, and J. Hood Wright have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, in the second circuit, in favor of you the said [William Berney,

*Stricken out as per stipulation & order filed Aug. 7, 1884.—T. G., cl'k.

Saffold Berney, Chollet Berney, Robert Berney, Phillipa Rousseau, Sophia White, Ann M. Ball, Phillipa E. Harley, Laurent B. Hallonquist, Robert L. Hallonquist, William C. Hallonquist, and]* Louise Berney, and have filed the security required by law, you are therefore hereby cited and admonished to appear before the said Supreme Court of the

United States, at the city of Washington, on the first day
41 of the next term of said Supreme Court, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, this 17th day of January, one thousand eight hundred and eighty-four.

WM. J. WALLACE,
Circuit Judge.

TRACY, OLMSTEAD & TRACY,
Sol'rs for Plaintiffs, 50 Wall St., N. Y.

42 [Endorsed:] U. S. circuit court, southern dist. of New York. Francis A. Drexel *et al. vs.* William Berney *et al.* Citation. Tracy, Olmstead & Tracy, solicitors for appellants, 50 Wall St., N. Y. [Stamped:] U. S. circuit court, Jan. 21, 1884. Timothy Griffith, clerk.

Service of a copy of the within citation is hereby admitted Jan'y 18, 1884.

LORD, DAY & LORD,
Sol'rs for Def't, L. Berney.

43 U. S. Circuit Court, S. D. N. Y.

FRANCIS A DREXEL *et al. against* WILLIAM BERNEY *et al.*

It is hereby stipulated that the original proceedings on file with the clerk of this court may be amended as follows:

By striking out the names of William Berney, Saffold Berney, Chollet Berney, Robert Berney, Philippa Rousseau, Sophia White, Ann M. Ball, Philippa E. Harley, Laurent B. Hallonquist, in the address and recital of the citation upon appeal, so that Louise Berney shall be the sole respondent on said appeal.

And it is further stipulated that the said citation as so
44 amended be returned in the record herein.

Dated May 12, 1884.

TRACY, OLMSTEAD & TRACY,
C. E. TRACY,
Attorneys for Plaintiffs and Appellants.
LORD, DAY & LORD,
Att'ys for Respondent, Louise Berney.

Ordered accordingly.
(S'g'd) WM. J. WALLACE.

(Endorsed:) U. S. circuit court, S. D. N. Y. Francis A. Drexel *et al.* against William Berney *et al.* Stipulation. U. S. circuit court. Filed Aug. 7, 1884. Timothy Griffith, clerk.

45 Upon the hearing of this cause no opinion was given, but a memorandum was endorsed on the bill as follows:

"Demurrer sustained.

"Jan'y 2d, 1884.

"W. J. WALLACE."

46 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Timothy Griffith, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to forty-five, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Francis A. Drexel *et al.* against Louise Berney, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this seventeenth day of September, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the said United States the one hundred and ninth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 305. Francis A. Drexel, Anthony J. Drexel, Charles H. Godfrey, Joseph W. Drexel, John Pierpont Morgan, & J. Hood Wright, appellants, *vs.* Louise Berney. Filed 18th September, 1884.

122-241

U. S. Supreme Court.

DREXEL

vs.

BERNEY.

BRIEF FOR APPELLANTS.

This is an appeal from a final decree in equity rendered by the Circuit Court of the United States for the Southern District of New York, dismissing the appellants' bill of complaint upon a demurrer thereto interposed by the appellee (fol. 30).

Statement of the Case.

The complainants compose the firm of Drexel, Morgan & Co., bankers at the City of New York. The defendants are the persons named as legatees under the will of one Robert Berney, who died at Paris, France, November 19, 1874. The complainants are all citizens of Pennsylvania and New York. The defendant who thus demurred is a citizen of France, the other defendants are citizens of Texas and Alabama (fol. 1).

The bill alleges in substance :

1. That said Robert Berney, the decedent, made his will November 2, 1864, at Croydon, England, whereby he bequeathed his residuary estate to

his executors therein named as trustees and upon trusts, among others, for the benefit of his widow, the defendant Louise Berney, and of the other persons named as defendants; and afterwards, on the 25th of September, 1874, a codicil thereto, making changes in some of the bequests in his will, and appointing as executors and trustees of his will the defendant Louise Berney, also James Berney, his brother, a Mr. Messier de St. James, of Paris, France, and John Drummond and William Drummond (fols. 2–4).

2. That Robert Berney died at Paris, France, November 19, 1874, leaving him surviving his widow, the defendant Louise Berney, his said brother, James Berney, and nephews and nieces, who are named as defendants in the bill of complaint. His widow was a native of France, and was with him at the time of his death, but his said brother James and his nephews and nieces were all citizens and residents of Montgomery County, Alabama, said St. James was a resident of France, and the Messrs. Drummond, of England. The decedent left personal estate in France, England and the United States (fol. 4).

3. At the time of his death, Robert Berney, the decedent, was a citizen of the United States, who had lived abroad for some years, but had never acquired a domicile in France under or in accordance with its laws (fol. 5.) Upon his death, his widow, the defendant Louise Berney, presented the will and codicil of the decedent to the proper judicial authority in France, and in accordance with French law, the administration of the estate was committed to a notary by competent judicial authority, December 4, 1874.

4. Subsequently, and before anything else was done, and on the application of said James Berney, the brother of decedent, and one of his executors, the will and codicil were formally admitted to probate, and letters testamentary thereon issued to said James Berney alone, by competent judicial authority at Montgomery, Alabama,

on the 8th of February, 1875, the decree of the Alabama Court being that the decedent was domiciled at Montgomery, Alabama, and that it had full jurisdiction in the premises. All of the heirs at law and next of kin of the decedent, except the widow, the defendant Louise Berney, were at that time citizens and residents of Alabama, and by the laws of Alabama such probate and issue of letters testamentary cannot be impeached collaterally, and are conclusive upon all persons and parties (fol. 6).

5. That said James Berney having been thus constituted sole executor, gave a full power of attorney to said St. James empowering him among other things to reduce the decedent's estate to possession, and to sell any and all property, etc. About the same time and on the 9th of March, 1875, said James Berney, being thus sole executor by reason of the Alabama probate, obtained the issue to himself by the Surrogate or Court of Probate in the City of New York, of ancillary letters testamentary, based upon the Alabama probate. This adjudication is in due form, and also remains unimpaired and in full force. All of the said proceedings of said James Berney were known to the defendant Louise Berney and the other persons named as executors, as well as to the legatees under the will, the other defendants in the bill of complaint (fols. 7–8).

6. That at the time of the decedent's death, certain evidences of title of the personal property left by him were in his possession at Paris, France, and the purpose and intention of the proceedings above-mentioned was to secure immunity of the decedent's estate from taxation in France, and to provide for the due and lawful administration of the assets, which were then actually in the possession of the widow, the defendant Louise Berney, and said St. James, and by the joint action of the sole qualified executor, said James Berney, said St. James and said defendant Louise Berney, before the notary to whom the matter had been so judicially committed in France

as aforesaid, the whole estate and its administration was entrusted to said St. James, as attorney for said James Berney, executor, with the knowledge and approval of all parties in interest, including the defendants. Formal proceedings were afterwards had before the notary at Paris, on the 30th and 31st of March and the 3d and 4th of May, 1875, and afterwards on the 11th of June, 1875, and on those dates formal documents or records were duly executed by the parties before the notary: the first, by the widow, the defendant Louise Berney, and said St. James: and the second, by the same persons in connection with said James Berney, the qualified executor, in person. At these proceedings and in the notarial instruments or records it was formally evidenced and declared that the decedent was at the time of his death domiciled at Montgomery, Alabama, that the probate of the will in Alabama was regular and valid, and that said James Berney was the sole qualified executor, and his power of attorney substituted said St. James in all the executor's functions and rights, and the defendant Louise Berney acknowledged receipt of the legacies given to her by the will from the administration of the estate thus constituted. By the laws of France, neither the defendant Louise Berney, nor any other of the persons named as executors in the will, nor any one claiming under them, are permitted to assert the contrary of any of the matters thereby established (fols. 10–12).

7. That among other assets the decedent left $200,000 in United States bonds, $12,500 in stock of the U. S. Mortgage Co., $58,200 in stock of the N. Y. Central & H. R. R. R. Co., £8,000 in bonds of the N. Y. & Canada R. R. Co., £3,000 bond and mortgage on real estate in England, and moneys on deposit with bankers at London. Of these items said James Berney, in person took possession of and sold the $12,500 in stock of the U. S. Mortgage Co. and the $58,200 in stock of the N. Y. Central & H. R. R. R. Co. On the 15th of June, 1875, the defendant Louise Berney and said

St. James procured proof of the will and codicil in common form, and the issue of letters testamentary to them by a competent court in England, and having taken possession of the £8,000 in bonds of the N. Y. & Canada R. R. Co., and the £3,000 bond and mortgage on real estate in England, by virtue of their English letters got in and converted into money the assets in England, as to the last-mentioned item, an instrument having been jointly executed by all three of the parties, Louise Berney, St. James and James Berney. All these proceedings were had without objection on the part of any of the defendants. The $200,000 of United States bonds were sent to this country, and by agents of said St. James at the City of New York presented to complainants, with directions to change the bonds from registered to bearer bonds by selling the registered bonds, and with the proceeds buying bearer or coupon bonds of the same issue, the only method of effecting such exchange. The agents of said St. James furnished to the officers of the United States Treasury satisfactory evidence of their authority to transfer the bonds, and upon which the bonds were transferred, and the complainants sold the registered bonds and with the proceeds bought $195,000 of coupon bonds, and with a sum in money representing the difference delivered the same to the agents of said St. James, who, in their turn, delivered the same to said St. James himself after he and the defendant Louise Berney had taken out their letters testamentary in England (fols. 13–15).

8. That legacies given by the will and codicil to several of the defendants were duly received by them from James Berney or said St. James under the administration of the estate so established, and during all the times mentioned said James Berney was the agent for and actual guardian of the defendants and had full knowledge of all the aforesaid transactions (fol. 16).

9. That in the year 1880 said James Berney sent his son the defendant Saffold Berney to France, who then

and there, acting as attorney and agent for his father in his quality of executor, and for himself and defendants as legatees, instituted judicial proceedings against said St. James for an account of his administration of the decedent's estate, and finally received from said St. James, in full satisfaction and discharge of his liability to them, certain property. Because St. James has since died, and because of the laws and customs of France, complainants cannot ascertain the precise details of the transaction (fol. 17).

10. That the defendants now claim that said St. James diverted the $195,000 in coupon bonds and the money so received by him in exchange for the $200,000 United States registered bonds, and that the Alabama probate so obtained by said James Berney was invalid, because as they now assert the decedent was domiciled in France. The defendants have confederated together to assert and maintain this claim by means as follows: They have obtained from the Surrogate of New York County a second issue of ancillary letters testamentary to the defendant Louise Berney alone, based upon the false representation that the decedent's will had been admitted to probate in England in such manner as to justify the issue of ancillary letters testamentary here, and the false representation that there were unadministered assets in New York, and the fraudulent suppression of the facts concerning the former issue of letters ancillary to James Berney, founded upon the Alabama probate, and thereupon have brought an action at law in the Circuit Court of the United States for the Southern District of New York, in the name of said defendant, Louise Berney, as sole executrix under and by virtue of the letters so issued to her, against the complainants for conversion of said $200,000 United States bonds, and wherein they allege that said decedent was domiciled in France and the said Alabama probate was invalid for that reason, and that the letters testamentary so issued to the defendant, Louise Berney, are conclusive upon the complainants, so far as her right to bring

and maintain said action is concerned. Complainants are not permitted by law to procure the cancellation of said letters, or to contest the validity thereof. In view of the foregoing, complainants insist that the defendants are estopped in equity from now asserting against them that said decedent was not domiciled elsewhere than at Montgomery, Alabama, or that the proceedings of the executors at Paris are not binding upon them. Complainants also allege that the several matters and things above-mentioned may not be pleaded and do not constitute a defense to the action at law, etc. (fols. 18–19).

11. That in addition to the action at law in the Federal Court before referred to, the defendants have brought another action in the Supreme Court of the State of New York in their own names as plaintiffs against the complainants, wherein they make the like claim as to Robert Berney's domicile and the Alabama probate of his will, and assert that they are the owners of the $200,000 United States bonds, and that complainants have converted them, etc. (fol. 20).

12. That according to French law the defendant Louise Berney as the widow of the decedent would have been entitled to a certain portion of his estate, had he been domiciled in France. The portion she would have received under the French law, had the right been claimed or asserted by her, was much more than the value of the $200,000 of United States bonds, and consequently she cannot maintain the action at law in the right or interest of her co-defendants, if it be true that decedent was domiciled in France, until an accounting shall have been had between her and the legatees, under the will (fol. 21).

13. And that the defendants are all beyond the jurisdiction of the Court, and the defendant Louise Berney is an alien and resident of France, where her testimony cannot be taken by any ordinary process because of the laws of France, that the facts are within the

knowledge of defendants and a discovery is necessary, etc., etc. (fol. 21).

The relief sought was an injunction against setting up or claiming in the action at law or elsewhere that the decedent was not domiciled at Montgomery, Alabama, that his will was not duly admitted to probate there, and that the administration thereunder of said James Berney as sole executor and said St. James as his attorney were not valid and binding, and against using in support of such allegations the ancillary letters testamentary, which defendants have fraudulently and unlawfully procured to be issued to or in the name of the defendant Louise Berney, discovery of the facts within defendants' knowledge, etc.

The defendant Louise Berney demurred to the bill (1) for want of equity and (2) that no case for discovery was made (fols. 25, 26).

The demurrer was sustained. No opinion was given by the Circuit Judge (fol. 45).

Assignment of Errors.

1. That the Court below erred in sustaining the demurrer and dismissing the bill of complaint, whereas it should have retained the same as a bill in aid of the defense of an action at law.

2. That the Court below erred in sustaining the demurrer and dismissing the bill of complaint, whereas it should have determined that the complainants had not a plain, adequate and complete remedy at law.

3. That the Court below erred in sustaining the demurrer and dismissing the bill of complaint, whereas it it should have retained the same as a bill for discovery and other relief.

ARGUMENT.

First Point.

The bill was properly filed in aid of the defense of the action at law. The bill alleged defenses which are of purely equitable cognizance.

By demurring the defendant admitted the truth of the allegations of the bill.

"The office of a demurrer is to bring before the "Court the right to maintain the bill upon the admis- "sion *pro hac vice* of the entire truth of all its allega- "tions; and the Court cannot look *aliunde* to search "out or conjecture what other facts might or did exist "to defeat the bill."

Ocean Ins. Co. vs. *Fields*, 2 *Story*, 59, 75.

It is therefore to be assumed as true:

(1.) That Robert Berney, the decedent, was in fact a citizen of the United States who had never acquired a domicile in France, and that the defendants, by agents acting within the authority conferred upon them, and with the subsequent approval and ratification of the defendants themselves, procured the probate of his will at Montgomery, Alabama, and a contemporaneous judicial declaration that the decedent was domiciled there, and a subsequent recognition and ratification of the same proposition in the quasi judicial proceedings which were had in France, and wherein the estate was actually administered, including a full and complete confirmation of St. James' power to do all that lawfully qualified executors might do or have done in dealing with the estate.

(2.) That the plaintiff, acting in good faith and relying upon the authority thus conferred on St. James, entered upon the transaction for which the defendants are now seeking to hold them liable as for a technical

conversion of the $200,000 of bonds, and wherein the defendants now assert the contrary of what was so judicially and formally declared at their instance.

(3.) That defendants are using in support of their present assertions the last issued ancillary letters testamentary in the name of the defendant Louise Berney alone (which they obtained from the Surrogate of New York by their own fraudulent representations, made for the purpose) to support their present assertions that the decedent was domiciled in France, and prevent the complainants from proving the former representations of defendants' agents and representatives, and to avoid the defense which complainants would have against an action in which Louise Berney was joint plaintiff with said St. James.

(4.) The defendants have in fact suffered no damage by reason of the alleged conversion, because as the real parties in interest they themselves have settled with and released said St. James, and consequently have destroyed the subrogation to which complainants would be entitled against said St. James, if defendants' claim against them should be maintained.

(5.) That Louise Berney cannot maintain the action in the individual right of her co-defendants, because, if their present assertions be true, Louise Berney as widow was entitled under the French law to more than $200,000 before there would be any estate left upon which the will would operate, and there has been no settlement between her and those claiming under the will, *i. e.*, her co-defendants. If on the other hand Louise Berney is prosecuting the action at law for her own benefit as an individual, she is estopped by her own acts from maintaining it.

Notwithstanding these matters, the action at law so brought by defendants can be prosecuted, if upon the trial thereof defendants shall be permitted to give proof tending to show that Robert Berney, the decedent, was domiciled in France, as alleged therein by defendants,

and for that purpose, the proceedings in the New York Surrogate's Court, resulting in the issue of ancillary letters testamentary to the defendant, Louise Berney, and the letters themselves, are competent, and by law, in some respects, presumptive and in others, conclusive, evidence for the defendants' present claims. It is the use of them for that purpose which complainants sought to have enjoined.

The provisions of the New York Code of Procedure under which the said proceedings were taken and said letters were issued, are as follows:

"§ 2472. Each surrogate must hold within his county "a court, which has, in addition to the powers con- "ferred upon it or upon the surrogate by special pro- "vision of law, jurisdiction as follows:

* * * * * *

"2. To grant and revoke letters testamentary and "letters of administration. * * *

"6. To administer justice in all matters relating to "the affairs of decedents according to the provisions of "the statutes relating thereto." * * *

"§ 2473. Where the jurisdiction of a surrogate's "court to make, in a case specified in the last section, a "decree or other determination is drawn in question "collaterally and the necessary parties were duly cited "or appeared, the jurisdiction is presumptively, and in "the absence of fraud or collusion, conclusively estab- "lished by an allegation of the jurisdictional facts, "contained in a written petition or answer, duly veri- "fied, used in the surrogate's court." * *

"§ 2474. The surrogate's court obtains jurisdiction "in every case by the existence of the jurisdictional "facts prescribed by statute and by the citation or "appearance of the necessary parties. An objection "to a decree or other determination, founded upon an "omission therein or in the papers upon which it was

" founded of the recital or proof of any fact necessary
" to jurisdiction, which actually existed, or the failure
" to take any intermediate proceeding, required by law
" to be taken, is available only upon appeal." * * *

" § 2514. * * *

" 11. The expression ' person interested,' where it is
" used in connection with an estate or a fund, includes
" every person entitled, either absolutely or contin-
" gently, to share in the estate or the proceeds thereof,
" or in the fund, as husband and wife, legatee, next of
" kin, heir devisee, grantee or otherwise, except as a
" creditor."

" § 2591. Subject to the provisions of the next sec-
" tion regulating the priority among different letters,
" letters testamentary * * * granted by a court or
" officer having jurisdiction to grant them as pre-
" scribed in this chapter, are conclusive evidence of the
" authority of the persons to whom they are granted,
" until the decree granting them is reversed upon
" appeal or the letters are revoked as prescribed in this
" chapter."

" § 2696. Where a will of personal property made by
" a person who resided without the State at the time
" of the execution thereof or at the time of his death,
" has been admitted to probate by a competent court
" within the foreign country or the State, or the terri-
" tory of the United States, where it was executed or
" where the testator resided at the time of his death,
" the surrogate's court having jurisdiction of the
" estate must, upon an application made as prescribed
" in this article, accompanied with an exemplified copy
" of the will and of the judgment, decree or order, so
" admitting the same to probate, and also of the foreign
" letters, if any have been issued, record the will and
" foreign letters, and issue thereupon ancillary letters
" testamentary or ancillary letters of administration
" with the will annexed as the case requires."

"§ 2697. Where the will specially appoints one or "more persons as the executors thereof with respect "to personal property situated within the State * * * "or in a case where such appointment is not made, "ancillary letters testamentary * * * issued as pre- "scribed in this article, must be directed to the per- "son named in the foreign letters. * * * Where two "or more persons are named in the foreign letters, "* * * the ancillary letters may be directed to either "or any of them without naming the others, if the "others fail to qualify or if, for good cause shown, to "the surrogate's satisfaction, the decree so directs."

"§ 2698. An application for ancillary letters testa- "mentary, * * * as prescribed in this article, must be "made by petition."

Under these statutes, clearly the proceedings in the New York Surrogate's Court for the issue of the ancillary letters testamentary to Louise Berney could not lawfully be other than either a continuation of the original proceedings, in which James Berney obtained the issue to him of ancillary letters, based upon the Alabama probate, or an issue of ancillary letters testamentary to Louise Berney and St. James, jointly, as they were both named as executors in the English letters; in the first instance the recognition of the validity of the Alabama probate would have followed, and in the second instance St. James would necessarily have been a joint plaintiff in the law action with Louise Berney, and in that case complainants could plead their defenses in the action at law without question as to their admissibility. But in their present form the proceedings and the ancillary letters testamentary issued to Louise Berney as sole executrix, enable her to repudiate all that was done by James Berney, St. James and herself or by either of them, including the Alabama probate and the letters issued to James Berney. The complainants are also prevented from questioning the jurisdiction of the Surrogate to grant

ancillary letters testamentary upon the alleged English probate. The letters thus granted are clearly unlawful, as *proof in common form* is not "probate of a will" in the sense intended by the statute referred to, for parties are not cited, nor are witnesses examined. It amounts only to authority to collect personal assets within the particular jurisdiction where it is granted.

Williams on Executors, p. 362 (*London*, 1873).
Enohin vs. *Wylie*, 10 *H. of L. cases, p.* 14.

The distinction here pointed out is clearly stated in

Lavin vs. *Emigrant Industrial S. I.*, 18 *Blatch.*, 1

The New York statutes above quoted have been judicially interpreted in other litigations between the parties to the effect hereinabove stated.

Thus, in *Drexel* vs. *Berney*, 1 *Demarest's R.*, 163, will be found the ruling of the Surrogate of New York County, upon an application of complainants to vacate the ancillary letters testamentary issued to Louise Berney, that the complainants had no standing in his court to make the application.

And in *Berney, Ex'x* vs. *Drexel*, 12 *Federal Reporter*, 393, will be found the ruling of the Circuit Court upon a demurrer interposed by complainants in the action at law, that the defendant in that action could not attack the said ancillary letters testamentary for invalidity in the proceedings before the Surrogate or for incorrect decision by the Surrogate that he had jurisdiction.

The opinion in the last case also shows that as a matter of law the action at law depends entirely upon the establishment by plaintiff in that action of the proposition that the decedent, Robert Berney, was domiciled in France (p. 395).

And the above quoted § 2591 of the New York Code has been interpreted as making letters so issued by the Surrogate conclusive evidence of authority, and as *prima facie* evidence of the facts upon which they are necessarily based.

Hurlburt vs. *Van Wormer*, 14 *Federal R.*, 709.

The proceedings of defendants in the New York Surrogate's Court, which they admit were fraudulent and invalid, therefore enable them not only to claim, but to prove as against the complainants that the will had been duly admitted to probate in England, and that assets of the estate remained in the State of New York unadministered, and thus to maintain their action at law in the name of Louise Berney, as executrix, while not only the real facts are to the contrary of what is alleged in that action, but also the defendants should be estopped from asserting them to be as they now claim.

The exception in above quoted § 2473, "of fraud or collusion," indicates only that when "fraud or collusion" is proved, the rule of evidence established by the statute cannot be invoked. The statute does not say, however, when or where the "fraud or collusion" is to be proved.

Such of the defenses to the claim of defendant as are of equitable cognizance must be availed of by bill in equity, as the fusion of law and equity which prevails under State practice does not obtain in the Federal Courts.

N. P. R. R. vs. *Paine*, 119 *U. S.*, 562.

All of the defenses which complainants here allege are cognizable in equity alone, for the reason that the matters arise out of acts which the defendants have performed as individuals, whereas the action at law is in the name of an executrix, whose right as such is derived from an independent and isolated proceeding upon the will, which not only ignores, but enables her to contest the validity of what was done previous to

her acquisition of her present right, as well as the satisfaction to the real parties in interest made by St. James, the alleged wrong-doer.

The estoppel arising thereon is not a legal one, because it does not arise out of privity of contract or of estate, but is purely equitable as it arises out of what the beneficiaries themselves did before Louise Berney obtained her present authority. The settlement between the defendants and St. James is probably no defense to the action at law.

An equitable estoppel is sufficient ground or basis for equitable relief.

" The correct view of an estoppel is that taken in a " recent work, where, indeed, the whole subject has " been learnedly and elaborately discussed. 'Certain " admissions,' it is there said, 'are indisputable, and " estoppel is the agency of the law by which evidence " to controvert their truth is excluded.' (Bigelow on " Estoppel, Introduction xii.) The law of estoppel, " therefore, is a branch of the law of evidence, and it " has become a part of the jurisdiction of chancery, " simply because in equity alone, or rather by equitable " construction alone, has that full effect been given to " this species of evidence, which is necessary to the " due administration of justice."

Bispham's Equity, section 280, *page* 273.

" Some may be described to be purely equitable es- " toppels, or those estoppels which, although they may " be recognized and acted upon in courts of law, never- " theless owe their origin and development to the ideas " of justice entertained and promulgated by courts of " chancery. This particular class of estoppels *in pais* " embraces what are known as estoppels by conduct; " and this phrase may be perhaps used as the correla- " tive term for equitable estoppels. (Horn *vs.* Cole, 51 " N. Hamp., 290; Bigelow on Estoppel, 370.)

"Equitable estoppel, or estoppel by conduct, has its "foundation in fraud considered in its most general "sense, because a man cannot be prevented by his con- "duct from asserting a previous right, unless the as- "sertion would be tantamount to a fraud upon a per- "son who had subsequently acquired the right. (Pat- "terson *vs.* Lytle, 1 Johns, 66.)

"Equitable estoppel might, therefore, have been no- "ticed under the general head of Fraud. (Hill *vs.* "Epley, 7 Casey, 334.) But it may properly receive a "separate consideration, because in modern times this "doctrine has assumed an importance which warrants "its notice as a distinct head of equitable jurisdiction."

Ibid, sections 281 *and* 282, *p.* 274.

"* * * It is now a well-established principle "that where the true owner of property holds out "another, or allows him to appear, as the owner of, or "as having full power of disposition over, the prop- "erty, and innocent third parties are thus led into "dealing with such apparent owner, they will be pro- "tected. Their rights in such cases do not depend "upon the actual title or authority of the party with "whom they have directly dealt, but they are derived "from the act of the real owner, which precludes him "from disputing, as against them, the existence of the "title or power which he caused or allowed to appear "to be vested in the party making the sale (McNeil *vs.* "Tenth National Bank, 46 N. Y., 325; Winton *vs.* Hart, "39 Conn., 16; Redd *vs.* Muscogee R. Co., 48 Ga., 102; "Moore *vs.* Metropolitan Nat. Bank, 55 N. Y., 41; "McHea *vs.* Matthews, 50 N. Y., 166; Pickering *vs.* "Busk, 15 East, 38; Gregg *vs.* Wells, 10 Ad. & E., 90; "Saltus *vs.* Everett, 20 Wend., 267, 284; Mowrey *vs.* "Walsh, 8 Cow., 238; Root *vs.* French, 13 Wend., 570; "Horn *vs.* Cole, 51 N. H., 287). This rule applies to "married women doing business for themselves under "the statute (Bodine *vs* Killeen, 53 N. Y., 93); *also to* "*heirs who assent to and encourage the sale of land by an*

" *executor who has no authority under the will to make* " *such a sale* (Favill *vs.* Roberts, 50 N. Y.) *And the* " *same is true of a cestui que trust who allows and* " *encourages the trustee to appear as absolute owner* " *of the trust property, and thereby causes an innocent* " *person to act upon that belief and to change his posi-* " *tion; the rights of the latter will have priority over those* " *of the cestui que trust* (Regina *vs.* Shropshire Union " Co., Law R., 8 Q. B., 420, Ex. Ch. see Waldron *vs.* " Sloper, 1 Drew, 193; Rice *vs.* Rice, 2 Drew., 73)."

Bigelow on Estoppel, 434.

Second Point.

The complainants have not "a plain, adequate and complete remedy at law."

Thus, in Boyce's Ex'r. *vs.* Grundy (3 Peters, 210), in which the complainant sought relief against a contract for the purchase of land, on the ground of fraud and upon which contract a judgment-at-law had already been recovered against him for two instalments of purchase money, the Court said:

> " It is not enough that there is a remedy at law; " it must be plain and adequate, or, in other words, " as practical and efficient to the ends of justice " and its prompt administration as the remedy in " equity.
>
> " In the case before us, although the defense of " fraud might have been resorted to and ought to " have been sustained in that particular suit, and " I will add would have greatly aided the com- " plainant in a bill to rescind, yet it was obviously " not an adequate remedy, because it was a partial " one. The complainant would still have been left " to renew the contest upon a series of suits, and " that probably after the death of witnesses."

This ruling has been repeatedly followed. In *Watson* vs. *Sutherland*, 5 *Wall.*, 74 (1866), it was held that a bill in equity would lie to prevent the levying of execution upon the complainant's stock of merchandise, although he had an action at law of trespass, because the damages would be inadequate.

See also *Barber* vs. *Barber*, 21 *How.*, 582.
Oelrich vs. *Spain*, 15 *Wall.*, 211.
Sullivan vs. *R. R. Co.*, 94 *U. S.*, 811.
Crane vs. *McCoy*, 1 *Bond*, 422.

In *Baker* vs. *Biddle*, 1 *Baldwin*, 394 (1831), it is said :

> " The tests of the relative jurisdiction over suits at " law and equity are : 1. The subject-matter. 2. The " relief. 3. Its application. 4. The competency of a " court of law to afford it."

In *Harrison* vs. *Rowan*, 4 *Wash. C. C.*, 205 (1819), it is said :

> " We hold it, therefore, to be perfectly clear that " where a case is otherwise proper for the jurisdiction " of a court of equity, it is no objection to its exercise " that the party may have a remedy at law. On the " other hand, we do not mean to lay it down that the " mere circumstance that a more complete remedy can " be afforded in the former than in the latter court, " is, of itself, a ground of jurisdiction. The inquiry " must always be, whether the case is within any of " the general branches of equity jurisdiction, as " claimed and exercised by that court."

The case at bar is fully within the rules thus laid down :

1. The Court at law cannot grant the relief here sought, namely: that, as against the complainants, the proceedings of defendant and her confederates before the New York Surrogate be declared fraudulent and void as against them, and that complainants may be protected against further vexation by defendant and her confederates in either of the actions brought by them.

2. The Court at law cannot take hold of the underlying fraud by which the letters testamentary held by defendant Louise Berney are affected.

3. The Court at law cannot enforce the estoppel whereby defendant Louise Berney and her confederates are precluded by their own acts from using the letters testamentary in support of the action pending in that Court, for the estoppel runs against them as individuals, and not against her in her present right as executrix.

4. The Court at law cannot enforce complainants' right to subrogation of defendants' demands against St. James, if complainants are chargeable as claimed by defendants. Nor can it enforce the compromise between St. James and the defendants for the complainants' relief.

The remedy at law could not exceed a judgment sustaining as true the legal defenses properly pleaded by complainants.

A precedent for this case is found in *Brown* vs. *Pacific Mail S. S. Co.*, 5 *Blatchf.*, 525, where an injunction was sought against anticipated *ex parte* proceedings affecting an election of directors about to be held, and for error or fraud for which there was a remedy at law. It is there said:

> "It is a case in which there would be no ade-
> " quate remedy at law; because the law, as settled
> " by the Supreme Court of the United States, in
> " regard to the jurisdiction in suits of equity, of
> " the Courts of the United States, in view of the
> " statute, which declares that there shall be no
> " remedy in equity where there is a plain, ade-
> " quate and complete remedy at law, is that the
> " remedy at law must be as efficient to the ends of
> " justice and its complete and prompt administra-
> " tion as the remedy in equity."

Third Point.

The bill should have been sustained as one to prevent the use or enforcement of a decree of an inferior law court illegally and fraudulently obtained. Such suits have been frequently maintained.

For example, the execution of a distress warrant for rent in arrear has been restrained.

Coit vs. *Horn*, 1 *Sandf., Ch.* 1.

Also the execution of warrants of dispossession under the statutory summary proceedings by landlord against tenant, although any error in the proceedings was subject to correction or review.

Valloton vs. *Seignett*, 2 *Abbot*, p. 121.
Welz vs. *Niles*, 3 *Daly*, 172.
Forrester vs. *Wilson*, 1 *Duer*, 624.

Also proceedings for foreclosure of a mortgage by advertisement, although there was a remedy at law for the wrong anticipated.

Vechter vs. *Brownell*, 8 *Paige*, 212.

Also the enforcement of a prior judgment alleged to have been paid, at the instance of a junior judgment creditor.

Shaw vs. *Dwight*, 16 *Barb.*, 536.

Also the enforcement of a tax lease which, though valid on its face, was affected by fraud.

Scott vs. *Onderdonk*, 14 *N. Y.*, 9.

Also the proceedings for admeasurement of a widow's dower, where the widow was estopped.

Wood vs. *Seely*, 32 *N. Y.*, 105.

Also the entry of a judgment upon a verdict against a depositary of money, when in the meantime the real owner had claimed the money, although the bill was

not for an interpleader and the plaintiff might have had relief on motion.

N. Y. and Harlem R. R. Co. vs. *Haws*, 56 *N. Y.*, 176.

Also proceedings for an accounting before a surrogate, when the persons seeking the account had released their claims, and the error of the surrogate was subject to appeal.

Wright vs. *Fleming*, 76 *N. Y.*, 517.

Also the enforcement of a fraudulently obtained decree of a surrogate.

Wright vs. *Miller*, 8 *N. Y.*, 9.

Even though there were a remedy at law by the laws of the State, that would not oust the jurisdiction of the Federal court in equity.

Robinson vs. *Campbell*, 3 *Wheaton*, 212.
Gordon vs. *Hobert*, 2 *Sumner*, 401.
Breeden vs. *Lee*, 2 *Hughes*, 482.

In the case at bar the remedy in the State court would be exactly that which is here sought, namely: A bill in equity to restrain the use of the fraudulently obtained letters against the complainants. The defendant and her confederates selected the Federal court for their action at law, and the same court had jurisdiction to render full justice between the parties in accordance with its own methods.

Fourth Point.

The bill should also have been sustained as one for discovery in aid of a defense at law.

In *Gass* vs. *Stinson*, 2 *Sumner*, 468 (1836), Judge Story says:

"But the jurisdiction of a court of equity is in-
"voked in this case for other purposes and other

" relief, for a discovery, for an injunction to the
" proceedings at law, and for other general relief
" upon all the merits, which a court of law is in-
" competent to administer."

The allegations of the bill are that all of the defendants are beyond the jurisdiction of the Court, that Louise Berney herself is an alien and resident of France; that the ordinary process of *dedimus potestam* to take her evidence is ineffective because of the laws of France; and that the facts are all within the knowledge of defendants and a discovery was therefore necessary.

In such a case the statutory permission to examine the defendant, Louise Berney, as a witness in the action at law cannot be availed of, as she could not be forced to testify under any process provided by law. She sits securely in France and brings the action at law here by her agents.

The provisions of the New York Code of Procedure which might be used in such a case have no application to actions in the Federal Courts.

Ex parte Fisk, 113 *U. S.*, 713.

Fifth Point.

The decree should be reversed, the demurrer overruled and defendants directed to answer.

WAYNE MACVEAGH,
C. E. TRACY,
Of Counsel for Appellants.

SUPREME COURT U. S.
FILED.
MAY 10 1887
JAMES H. McKENNEY,
CLERK.

122-241

U. S. Supreme Court.

FRANCIS A. DREXEL and others,
Complainants, Appellants,

AGAINST

LOUISE BERNEY, impleaded with WILLIAM BERNEY and others,
Defendant, Appellee.

} Appellee's Brief.

ABSTRACT OF PLEADINGS.

The complaint alleges that one Robert Berney died at Paris, France, on the 19th November, 1874, having previously executed his Last Will and Testament and the codicil thereto by which he appointed his wife, Louise de Berney, the appellee herein, his brother, James Berney, one Messier St. James, and John Drummond and William Drummond, his executors and trustees.

That the said testator left him surviving his brother James Berney, a sister, Philippa Seibels, and several nephews and nieces mentioned in the complaint, all of whom were, at the time of his death, citizens of the United States, but that his wife was a native of France (fols. 1–4).

That on the 8th February, 1875, James Berney, one of the executors of said will, procured its admission to probate in Montgomery county, Alabama, and that by the decree admitting it to probate it was adjudged that "Robert Berney was a citizen of the United States, domiciled in Montgomery county, Alabama;" that letters testamentary were thereupon issued to James Berney, and that the decree and issue of letters "were duly made and cannot

be impeached collaterally, and are in law conclusive of the right and power of said James Berney as executor of said Last Will, and of the due admission of said Will and codicil to probate, and of the proof thereof" (fols. 5, 6.)

That afterwards, James Berney, as such executor, gave to said St. James a power of attorney, authorizing him to sell any property belonging to the estate (fols. 6, 7).

That on the 9th March, 1875, said James Berney, upon certified copies of the probate of the Will in the Probate Court at Montgomery, Alabama, procured Letters Testamentary from the Surrogate of the City and County of New York, and that "the adjudication by "said Surrogate remains unimpaired and in full force, and was "duly given and made" (fols. 7, 8).

That the several acts of said James Berney in procuring the admission to probate of said Will and codicil and obtaining Letters Testamentary and the execution of the power of attorney by him to St. James were known and assented to by Louise Berney and the other persons named as executors and legatees in said Will (fol. 8).

That at the time of the death of the testator there was certain personal property of the estate in the City of Paris, which it was the duty of the executors to take charge of, and that the executors ratified the proceedings taken in the Probate Court of Montgomery county, Alabama, partly in order to establish the fact of the testator's domicile in the United States, and thus avoid a succession tax, for which the estate would otherwise have been liable, but chiefly to provide for the lawful administration of the property (fols. 8, 9).

That thereafter certain proceedings were had before a Notary in France, which were and are an adjudication by a judicial officer having jurisdiction of the persons and subject-matter; that said Robert Berney was a citizen of the United States, having his domicile in Montgomery county, Alabama; that the Will and codicil were duly admitted to probate and Letters Testamentary were duly issued by the Probate Court of said county, and that the power of attorney conferred upon St. James all the powers that it purported to confer (fol. 10).

That among other things said Robert Berner left $200,000 par value of U. S. Registered Bonds, which St. James, as attorney in fact for James Berney, as executor, through agents in the City of New York, delivered to the plaintiffs for the purpose of having

them converted into coupon bonds of the same issue, and that the plaintiffs sold said bonds and with the proceeds purchased $195,000 United States coupon bonds, which they delivered with $3,759.58 in cash to the agents of St. James, who delivered the bonds and paid the money to St. James himself, and that the same came into the hands of St. James, while he and Louise Berney held certain Letters Testamentary, issued to them in England, upon the probate of the Will in that country: and that the receipt thereof by St. James was and is a bar to any claim by Louise Berney against the complainants for said $200,000 of bonds (fol. 13–15).

That certain legacies were paid to said Louise Berney and to other legatees under said Will, which were received by said legatees from said James Berney, as such executor under the Letters Testamentary issued to him in Alabama (fol. 16).

That subsequently said James Berney sent his son, Saffold Berney, to Paris, and that said Saffold Berney, as the agent of said James Berney individually, and as executor, and as the agent of certain other persons interested under the Will, instituted certain legal proceedings against St. James at Paris for an accounting, and that St. James thereupon delivered certain property, which was accepted by said Saffold Berney and the persons for whom he was acting, in satisfaction and discharge of their demands against St. James, but that the complainants cannot learn the exact proceedings, because the records thereof are not accessible to them, (fols. 16–17).

That the defendants now claim that St. James diverted the coupon bonds and the $3,759.58 received by him from the Trust under which they should have been held; that the decree of the Probate Court of Alabama is void, on the ground that Robert Berney was not domiciled in that county, but was domiciled at Paris; that the transfer of said $200,000 of said U. S. bonds to said complainants was unlawful, and that they are liable therefor; and the complainants allege that the defendants have combined and confederated together to assert their said demand in the following manner, that is to say: on or about May 25th, 1881 said Saffold Berney, alleging that he was the attorney-in-fact of said Louise Berney, presented a petition to the Surrogate of New York county, alleging that the Will of Robert Berney had been duly admitted to probate in the High Court of Justice in

England; that assets of his estate remained in the County of New York unadministered; and that the said Surrogate thereupon issued ancillary Letters Testamentary to Louise Berney, who by virtue thereof brought an action against the complainants, in which it is alleged that Robert Berney was domiciled in France; that the probate of his will and codicil in Alabama was void for want of jurisdiction in the Probate Court; that the power of attorney was void; and that the complainants are liable for an alleged conversion of the said United States bonds; and that the defendants claim and insist that the proceedings so taken by said Saffold Berney before the Surrogate of New York County are conclusive upon them as to said Louise Berney's right to sue, although the complainants were not parties to said proceedings, and are not permitted by law to intervene therein or to procure the cancellation of said ancillary letters (fols. 17–19).

That the complainants are advised that the defendants ought to be estopped in equity from asserting that Robert Berney was domiciled elsewhere than in Montgomery County, Alabama, or that the proceedings in Paris mentioned in the complaint, by which the assets of the estate were placed in the hands of the said St. James as attorney in fact of said James Berney, as executor, &c., were not lawful and proper and did not confer the power which they appeared and assumed to confer, or that there is any liability on complainants' part to make good to said estate the said United States bonds, or their value, and that the several matters and things alleged in the complaint may not be pleaded and do not constitute a defense to said action at law, and that upon the trial of said action evidence thereof may be excluded for that reason (fol. 19).

That in addition to the action above mentioned the legatees under the will have commenced another action in the New York Supreme Court, wherein they allege that Robert Berney was domiciled in France, and that by certain rules of French law the said $200,000 of United States bonds became vested in them, and not in said James Berney as such executor, or in said Louise Berney and said St. James (fol. 20).

That the said Louise Berney would have been entitled to a portion of the estate her said husband, if he had been domiciled in France, and ought to have asserted any right in that regard which she may have had in the proceedings in France; that she not only then omitted to assert that her husband was domiciled in

France, but affirmatively claimed that he was domiciled in Alabama, and that the executors in administering the estate relied upon the statements of said Louise Berney in that regard; and that the share to which the said Louise Berney would have been entitled is much more than the value of said United States bonds, and that she should not be allowed to maintain this suit for her own benefit (fol. 20).

That the defendants, except so far as they have submitted to the process of the Court by bringing the said actions, are without the jurisdiction, and that said Louise Berney is an alien and resident of France, and that the ordinary process of a dedimus potestatem to take the evidence of said Louise Berney cannot be enforced in France, but that the facts alleged in the complaint are within the knowledge of the defendants, or some of them, and that they have interposed impediments to the plaintiff's efforts to ascertain facts.

The prayer for relief is that the defendants may be restrained from asserting in any action respecting said $200,000 of United States bonds or any part of the estate of Robert Berney which may have come to the complainants' hands that Robert Berney was not domiciled in Montgomery County, Alabama; that his said Will and codicil were not duly admitted to probate by the Probate Court of that County; that Letters Testamentary were not duly issued thereon; that said James Berney was not duly authorized to give said power of attorney to said St. James; that under said power of attorney said St. James was not vested with all the powers of said James Berney as such executor; and that the defendants and each of them may be enjoined from using in support of their claim that said Robert Berney was domiciled at Paris the ancillary Letters Testamentary issued to Louise Berney by the Surrogate of New York, or any proceedings before said Surrogate upon which said letters were issued.

The complaint closes with the usual prayer for process.

The demurrer assigns as grounds of demurrer: 1st. Want of equity. 2d. That no case is made for a discovery.

Preliminary.

The plaintiff's counsel insists in his first point that the defendant has by her demurrer admitted the truth of the allegations of the complaint from which it follows that she cannot maintain the

action of trover in the right of her co-defendants, and is estopped from prosecuting the action for her own benefit, but that still the action at law can be prosecuted unless the defendant is enjoined from prosecuting.

That a demurrer admits the allegation of the bill is true in a very qualified sense; it is an admission only for the purposes of the argument—in other words, the defendant insists that conceding the matters in the bill to be true there is no equity, and the demurrer in this case does not preclude the defendants from joining issue on the allegations set up in the complaint, if they should be pleaded in the action at law as a defense.

The question in this cause is not whether the defendants have or have not a good claim against the complainants, or whether the complainants have or have not a defense to such claim, but simply whether such defense if it exists is legal or purely equitable and whether the claim shall be tried on the equity or the common law side of the Court, and the argument is necessarily confined to that bare legal question.

First Point.

The bill does not seek to enjoin the defendants from prosecuting any actions to recover from the complainants the United States Bonds, or their value, but simply to enjoin the defendants from asserting in such action or actions, that Robert Berney was not domiciled in Alabama, or that his will was not duly proved, and letters testamentary, duly issued in that county, or that the power of attorney to St. James was not valid, or from using in support of the claim that Robert Berney was domiciled in Paris the proceedings before the Surrogate in New York County.

The bill does not admit that Robert Berney was not domiciled in Alabama, but on the contrary, insists that the allegations of the defendants in that regard are false, nor does it anywhere appear that the complainants would have any difficulty in proving in any suit brought against them, what they claim to be the true facts in respect to such domicile. On the contrary, the complainants insist that in two judicial proceedings, namely: The proceeding before the notary in France, and before the Probate Court in Alabama, it has been determined that Mr. Berney was domi-

ciled in Alabama, and that these adjudications are binding. The only reason they assign for seeking the relief on the equity side of the Court is, that they should not be put to the expense of defending the actions brought by the defendants.

The matter in dispute is therefore not the bonds or their value, but the expense to the complainants of defending actions at law. As it does not appear that such expense will exceed $5,000, the case is not appealable to this Court.

Second Point.

The only ground on which the complainants seek relief is that the defendants, by their conduct, are estopped from asserting that Robert Berney was domiciled in Montgomery County, Alabama, or that James Berney, as executor under the probate of the will, and the letters issued to him in Alabama, and St. James as his attorney, had not the power to dispose of the bonds mentioned in the complaint, and that on account of an alleged fraudulent concealment by Saffold Berney, upon his application for ancillary letters to the Surrogate of New York County, to be issued to Louise Berney, the defendants should be precluded from using the proceedings before said Surrogate as evidence of Robert Berney's domicile.

If these matters could be availed of by the complainants, as matter of defence in the actions at law brought against them, the complaint was rightly dismissed, for they had on that assumption, "a plain, adequate and complete remedy at law."

While the doctrine of equitable estoppel originated and was promulgated by Courts of Chancery, it is now recognized and enforced as liberally in Courts of Law as in Courts of Equity.

Dickerson v. Colgrove, 100 U. S., 578.

The complainants, therefore, can avail themselves of the estoppel, even if it be of the character commonly known as equitable estoppel, as a defence at law, and there is no necessity for their seeking affirmative relief in equity, nor does the alleged fraud in obtaining Letters Testamentary to Madam Berney, furnish any ground for equitable interference, for the allegations in such proceedings only establish jurisdiction in the absence of fraud, and fraud, if it

exists as the complainants allege, will undoubtedly be available to them in any action in which the proceedings may be used in evidence.

N. Y. Code of Procedure, sec. 2473, (cited on Appellant's Brief, page 11.)

In the Federal Courts the proceedings under which letters testamentary or of administration are granted are not conclusive evidence even of the fact of the death of the alleged testator or intestate.

Lavin *v.* Em. Ind. Savg. Bk., 18 Blatch., 1.

Third Point.

The complainants have not made out a case of equitable estoppel. The very essence of such an estoppel is, that the party seeking to set it up should have done or omitted to do something relying upon statements or conduct of the adverse party, justifying him in the belief that a certain state of facts existed, which, on account of such action on his part, the other side should not be allowed to gainsay. The complainants allege that the defendants have by their acts conceded that Robert Berney was domiciled in Alabama, but it does not appear that such action ever came to the knowledge of the complainants, or that their actions had been in the slightest degree affected by the proceedings in France, or by the part, if any, taken by the defendants therein.

These proceedings in France furnish no defence to the action, or else constitute an estoppel of record. The complaint, instead of showing an equitable defence, which cannot be asserted at law, shows facts which, if they constitute a defence at all, are rather of legal than of equitable cognizance.

Fourth Point.

The Bill cannot be sustained as one for discovery in aid of a defence at law, because the complainants have propounded no interrogatories as required by the rules, when a discovery is desired.

Bailey Washing Machine Co. *v.* Young, 12 Blatch., 200.
Equity rules, 40-41.

Fifth Point.

An application to restrain or interfere with an action at law is addressed to the discretion of the Equity Judge, conceding for the moment that the Circuit Judge might have entertained the bill, if the convenient and orderly administration of justice would have been promoted by his so doing, it is insisted that such would not have been the case. If the bill had been sustained, the Court would have had to hear the cause upon the question of estoppel alone, or else to have dragged in and determined the other issues involved in the legal actions. If the latter course were adopted, it would be necessary to dismiss the complaint in this case, unless the complainants establish an equitable defence, for otherwise, the defendants would have been deprived of a trial by Jury in a purely common law action. To hear the case on the question of estoppel alone would be to try the controversy by piecemeal. All this is avoided by compelling the complainants to assert in the common law actions a defence, which, if a defence at all, is perfectly available to them at law.

Sixth Point.

The cases cited by appellant's counsel in his third point, are not applicable. Most of them go upon the jurisdiction of a Court of Equity to enjoin a threatened trespass, while in the other cases the Equity jurisdiction was invoked on grounds very different from those alleged in the bill in this cause.

Seventh Point.

The decree should be affirmed with costs.

GEORGE DE FOREST LORD,
FRANKLIN B. LORD,
of Counsel for Appellees.